IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, *Petitioner*

v.

FRITZ KOPKE, ET AL, *Respondents*

BRIEF FOR RESPONDENTS

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To The Honorable The Chief Justice and The Associate Justices Of The Supreme Court Of the United States:

The opinions of the Courts below and the statement of the grounds of jurisdiction of this Court are adequately presented in the Brief for Petitioner.

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harborworkers' Compensation Act, 44 Stat. 1426 (1927), 33 U.S.C. §905 (1970), provides:

"Exclusiveness of liability

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

QUESTIONS PRESENTED

1. In a maritime personal injury case, is there a right of contribution among joint tortfeasors who share a common liability to the injured party?

2. Should damages be evenly divided between a shipowner and a stevedoring contractor where their joint negligence has contributed in equal proportions to cause the loss?

STATEMENT OF THE CASE

This case originated as an action in admiralty by Troy Sessions for damages for personal injuries sustained by him while in the course of his employment as a long-

shoreman aboard the SS KARINA, a vessel then owned and operated by Fritz Kopke, Inc., and under charter to Alcoa Steamship Company (hereinafter collectively referred to as "the Vessel"). The KARINA then lay upon navigable waters at the Port of Houston, Texas, and the suit was brought in admiralty.

The Vessel brought a third party action against the stevedoring contractor which was Sessions' employer on the occasion in question, Mid-Gulf Stevedore, Inc. (hereinafter "Mid-Gulf"). It brought another third party action against Cooper Stevedoring Company (hereinafter "Cooper") the stevedoring contractor which had previously loaded, at the Port of Mobile, Alabama, the cargo over which Sessions was working on the occasion of his accident. In both third party complaints, the Vessel contended that, if it should be shown to be liable to Sessions, it would be because of negligence attributable to the third party defendant or because of an unseaworthy condition which the latter caused or created.

The incident made the basis of this suit occurred on July 2, 1969, while the KARINA was docked at the Port of Houston. Sessions and other longshoremen in the employ of Mid-Gulf began loading sacked cargo in the ship's number one hatch at 10:00 a.m. and were the first longshoremen to enter that hatch since the ship's arrival in Houston. Within that hatch they found a tier of palletized crated cargo, consisting of fire bricks and furnace liner, which had been previously loaded and stowed at Mobile on June 28, 1969, by employees of Cooper. The Houston longshoremen had to utilize the top of this tier of crates as a flooring on which they walked and stowed the Houston cargo. It was while walking atop this previously stowed cargo and carrying a sack weighing

about 100 pounds that Sessions stepped into an opening between the crates and thereby sustained his injuries. The opening or gap into which he stepped was concealed by a piece of white, corrugated paper, which was approximately ten feet long and three to four feet wide.

Prior to trial, the Vessel entered into a compromise and settlement of its third party action against Mid-Gulf, which was then dismissed from the case. Subsequently, the attorneys which had previously represented Mid-Gulf were substituted as counsel for the Vessel. However, contrary to petitioner's representation in its brief that Mid-Gulf "took over the defense of the vessel, agreeing to indemnify the vessel fully," the terms of the settlement agreement betwen the Vessel and Mid-Gulf were never adduced at trial by competent evidence and do not appear of record.

After trial on the merits, the District Court (Singleton, J.), sitting without a jury in admiralty, found that the negligence of Cooper in failing properly to secure the crated cargo so that it would not move and separate during ocean transit, and/or in failing to place some kind of dunnage over the cargo to provide a smooth flooring, brought about the creation of an unsafe condition in the number one hold which was the proximate cause of the plaintiff's injuries. (A. 163-164) It further found that such negligence on the part of Cooper constituted a breach of its implied warranty of workmanlike service. (A. 168) It observed in its findings that Cooper should have foreseen that longshoremen in subsequent ports would have to work over this cargo in completing stowage of the hold. (A. 164) The District Court found that the paper which concealed the hole into which

Sessions stepped was already present in the hold when the Houston longshoremen entered and was not placed there by employees of Mid-Gulf. (A. 164-165) However, the Trial Court was unable from the evidence to make any finding as to how the paper came to be there or who was responsible for its presence. (A. 165)

Contrary to petitioner's representation in its brief, the District Court did not find that the Vessel was precluded by its conduct from obtaining indemnity from Cooper. Rather, the District Court simply announced its opinion that "the ship itself has a responsibility on cargo" and concluded that "the only thing to do is to divide the liability in this case equally" between the Vessel and Cooper. (A. 165) Therefore, the Court entered judgment for Sessions, decreeing that he recover damages from the Vessel and that the Vessel have contribution, in effect, from Cooper for one-half of the damages it was required to pay.

Cooper appealed to the United States Court of Appeals for the Fifth Circuit, and the Vessel cross-appealed from that part of the judgment denying the Vessel full indemnity. The Court of Appeals affirmed the District Court, construing the District Court's findings as a determination that the Vessel's conduct precluded its "full recovery" on the indemnity claim for breach of Cooper's warranty and that contribution between the vessel and Cooper as joint tortfeasors was therefore proper. (A. 20)

SUMMARY OF ARGUMENT

Division of damages among parties whose concurring fault has caused the loss is, and has always been, the rule

in admiralty. For a century this Court and the lower courts have repeatedly recognized contribution among joint tortfeasors as a substantive right in every case of maritime tort founded upon negligence, without distinction between those cases involving ship collisions and any other case where there is negligence in the party suing. This Court has recognized no exception to the rule, except that it has declined to fashion a rule of contribution in the context of cases where the wrongdoer against whom contribution is sought is immune by statute from liability for his tort, as in the case of an employer who is shielded by a workmen's compensation statute from any liability based upon fault for injury to his employees. The lower courts have properly understood this distinction and have continued to apply the rule of contribution in maritime personal injury and property damage cases where there is common liability of multiple tortfeasors to the injured party.

Adjustment of the rights and obligations among diverse parties and interests in the field of maritime commerce has been primarily a judicial concern in modern times, and this Court has assumed the role of principal policy maker in defining the rights *inter se* between shipowners and stevedores and other analogous relationships. It is therefore the proper concern of this Court, and in the interest of uniformity and continuity in the law admiralty, that the equitable and reasonable maritime doctrine of comparative fault be applied without exception, save only in that narrow class of cases involving statutory immunity of the party against whom contribution is sought.

Contribution is clearly proper in the present case, since both the Vessel and Cooper were potentially liable

and vulnerable to suit by Sessions, and since the District Court found that the joint negligence of each contributed in equal proportions to cause Sessions' injuries and damages.

Since the parties in this case stand in the special contractual relationship of shipowner and stevedore, the applicability of rules of contribution must be reconciled with the special rules of indemnity which the courts have traditionally applied in that context. This Court has recognized that a shipowner may recover its full indemnity where damages result from an improper or unworkmanlike performance by a stevedore, notwithstanding any concurrent fault on the part of the shipowner which is not sufficient to prevent the stevedore from discharging his implied warranty of workmanlike service. If the present case is to be decided strictly on an implied indemnity basis, then the Vessel is entitled to recover full indemnity from Cooper.

On the other hand, this Court has also apportioned damages on a comparative fault basis between parties standing in a contractual relationship. Since the all-or-nothing indemnity approach was fashioned largely to circumvent the impediment to contribution posed by a stevedore's statutory immunity from liability for his employee's injuries, and since that problem does not exist in the present case, the Court could justifiably adopt a modified indemnity approach which would limit the shipowner's recovery on the stevedore's breach of warranty to those damages not caused by the former's own negligence. On that basis, the judgments below awarding contribution in the present case should be affirmed.

ARGUMENT

I.

CONTRIBUTION HAS HISTORICALLY BEEN A SUBSTANTIVE RIGHT IN EVERY CASE OF MARITIME TORT FOUNDED UPON NEGLIGENCE AND PROSECUTED IN ADMIRALTY.

As a matter of historical fact, Cooper is clearly mistaken in claiming that "there is no right of contribution among joint tortfeasors in admiralty," (Brief for Petitioner, p. 6) and indeed elsewhere concedes that "[i]n collision cases there has long existed a rule of contribution through the divided damages rule * * *." (Brief for Petitioner, p. 8). However, Cooper contends for the stricter proposition that the rule of divided damages does not apply except in those classes of cases concerned with fixing responsibility where two vessels collide. In point of fact, it can be demonstrated that the general applicability of the rule, without any such distinction, has been repeatedly recognized by this Court for a century.

It is true that the divided damages rule finds its historical origin in the context of ship collision cases, where it is established admiralty doctrine that "where both vessels are in fault, they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained." *The North Star,* 106 U.S. 17 (1882). In the case cited, the Court documented many authorities, going back as far as the laws of Oleron and Wisbuy, and continuing down to *The Catherine v. Dickinson,* 58 U.S. (17 How.) 170 (1854), and cases

following it, to show that this has always been the method of apportionment. One writer has traced the history of contribution under maritime law to the thirteenth century ("and there is no reason to suppose it to have been an innovation then"), finding application in varying forms under codes of northern and southern Europe as well as in the Orient, in the Ordonnance of Louis XIV and as applied by the English Admiralty. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304, 305-310 (1957).

In the United States, the proposition that damages were divided in cases of mutual fault was noticed by this Court in 1843 in *The Louisville*, 42 U.S. (1 How.) 89, 92 (1843), and squarely applied eleven years later in *The Catherine*, 58 U.S. (17 How.) 169, 177 (1854). It had been cited by a lower court as early as 1836. *The States Rights*, 20 Fed. Cas. 201, 208 (E.D. Pa. 1836).

By 1875, this Court had given application to the rule of contribution outside the context of a collision case, where a towing vessel had (without collision) caused damage to its tow. *The Alabama and The Gamecock*, 92 U.S. 695 (1875). See also: *The Virginia Ehrman*, 97 U.S. 309 (1877). Since that time, it may fairly be said, it has been understood by scholars and practitioners alike that in admiralty the rule is general, that "[t]he right to contribution is a consequence of the joint tort and attached to the joint liability," 2 Benedict, *Admiralty* 552 (6th ed. 1940), and the courts have likewise recognized that where "the suit is in the admiralty * * * contribution between joint tortfeasors has existed since 1875." *Barbarino v. Stanhope S.S. Co.*, 151 F.2d 553, 555 (2d Cir. 1945).

Historically, this Court has applied the divided damages rule to cases where a ship strikes a fixed object, such as a pier, e.g., *Atlee v. Packet Co.*, 88 U.S. (21 Wall) 389 (1874), without distinction between an ordinary ship collision and any other case where contributory negligence is found in the party suing. Cargo damages, incurred through the joint fault of ship and stevedore, have been divided according to the rule as far back as the case of *Snow v. Carruth*, 22 Fed.Cas. 724, No. 13144 (D. Mass. 1856), a case expressly approved by this Court in *The Max Morris*, 137 U.S. 1 (1890). This Court has granted contribution between a ship grounded by negligent navigation and a canal company which misrepresented the depth of the water, which joint fault caused damage to a shipper's cargo, *White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co.*, 258 U.S. 341 (1922), and has affirmed a division of damages in a cargo damage case between an unseaworthy ship and a negligently stowing charterer, *The Nidarholm*, 34 F.2d 442 (1st Cir. 1929), aff'd 282 U.S. 681 (1931). The Court has approved a division of damages between wharfinger and vessel owner where a vessel grounds or breaks loose through the fault of both. *Christian v. Van Tassel*, 12 Fed. 884 (S.D.N.Y. 1882), approved in *The Max Morris, supra.*

The question of the applicability of the divided damages rule in a personal injury case was first squarely presented to this Court in *The Max Morris*, 137 U.S. 1 (1890). In that case, the district court had allowed recovery to a longshoreman for his loss of wages due to his injury, but denied any recovery for pain and suffering or other consequential damages because of his own contributing negligence, holding that "the practice in admiralty to apportion damages in cases of mutual fault is not strictly con-

fined to collisions and prize causes." *The Max Morris*, 24 Fed. 860 (S.D.N.Y. 1885). The Circuit Court affirmed, relying upon this Court's opinion in *Atlee v. Packet Co.*, 88 U.S. (21 Wall.) 389 (1874), and agreeing with the trial court that "the collision rule for dividing damages can no longer be considered as applicable only to cases involving the rights and responsibilities of parties for colliding vessels." *The Max Morris*, 28 Fed. 881, 886 (C.C. S.D.N.Y. 1886). However, the Circuit Court certified to this Court the question whether the libelant was "entitled to a decree for divided damages." In its opinion, this Court reviewed the precedents in both collision cases and non-collision cases in which damages had been divided, and concluded as follows:

> "All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. . . . *We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision.* The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." 137 U.S. at 14-15 (emphasis added).

Though the Court went on to reserve opinion on whether the damages should be divided equally or proportionally, its language has since been regarded by the lower courts as authority for unequal division, and this Court has recognized the case as authority for "the established ad-

miralty doctrine of comparative negligence." *Socony-Vacuum Oil Co., Inc. v. Smith*, 305 U.S. 424, 429, 431 (1939).

Subsequently it has been established that division of damages according to fault extends to a seaman's or longshoreman's suit for unseaworthiness of a vessel, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). Legislative intrusions into the field have created no exceptions. The concept has been incorporated into the seaman's statutory negligence action under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. §688 (1958), and in the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§761-768 (1958), which provides a remedy for wrongful death on navigable waters outside the jurisdictional limits of any state.

The commentators have elsewhere chronicled the lower court decisions applying the rule of divided damages in many other classes of admiralty cases, including those involving tug and tow, foul berth, crowding and swell damage, grounding, stevedore damage to vessels, and service contracts, and in a miscellany of fact situations which serve "to show perhaps that the limit is set only by the tortious propensity of man." Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L.Rev. 304, 334 (1957). See generally, Staring, *id.*, pp. 321-334; Allbritton, *Division of Damages in Admiralty—a Rising Tide of Confusion*, 2 Journal of Maritime Law and Commerce 323, 338 (1971).

In view of this historical context, Mr. Justice Holmes observed, in *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U.S. 220, 225 (1907), that notwithstanding the general reluctance of the common law courts to recognize an

enforceable right of contribution, "* * * the admiralty rule in this country is well-known to be the other way. * * *" It clearly appears that divided damages, including contribution among joint tortfeasors, has historically been the rule in admiralty in every case of maritime tort founded upon negligence, whether or not involving a collision of vessels.

II.

THIS COURT HAS NOT CREATED ANY EXCEPTION TO THE ADMIRALTY RULE PERMITTING CONTRIBUTION AMONG JOINT TORTFEASORS, EXCEPT IN THOSE CASES WHERE THE STATUTORY IMMUNITY OF ONE OF THE WRONGDOERS PRECLUDES COMMON LIABILITY FOR THE TORTIOUS ACT.

Notwithstanding the long-established recognition by this and other admiralty courts of the right of contribution among joint tortfeasors, Cooper contends that this Court should now read its prior decisions in *Halcyon Lines v. Haenn Ship Ceiling Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawana R. Co.*, 406 U.S. 340 (1972), as disapproving any application of the rule of divided damages outside the context of a case involving the collision of vessels. However, an examination of these holdings refutes any inference of this Court's intention to overrule ten decades of American case law to the contrary.

A. The *Halcyon* case.

In *Halcyon*, this Court considered a case arising out of a longshoreman's suit against a shipowner for per-

sonal injuries received when he was working aboard a vessel. The shipowner brought a third party action against the stevedore company which employed the injured longshoreman, alleging that the stevedore was jointly negligent and claiming contribution from it. The longshoreman was precluded from suing his employer, the stevedore, because of the limited liability accorded the employer by the terms of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter referred to as "the Longshoreman's Act"). At trial, a jury had found that the shipowner's negligence contributed to the plaintiff's injuries in amount of 25% and that the stevedore's negligence contributed in amount of 75%. However, the District Court was of opinion that the "mutual fault" rule of divided damages was applicable and rendered a judgment holding the shipowner and the stevedore each liable for one-half of the plaintiff's damages. 89 F. Supp. 265 (E.D. Pa. 1950). The Court of Appeals agreed that a right of contribution obtained between the shipowner and the stevedore, but held that the stevedore's share could not exceed its statutory liability under the Longshoreman's Act. 187 F.2d 403 (3rd Cir. 1951).

In this Court, the shipowner urged that a judgment be rendered allowing contribution on a comparative fault basis in accordance with the findings of the jury; the stevedore argued for a prohibtion of contribution, or alternatively for an equal division of damages.

This Court noted the extensive legislative "inroads on traditional court law" in the area of maritime personal injuries, particularly the Longshoreman's Act, and concluded that it would be "inappropriate" to adopt "the rule

of contribution here urged" because Congress "while acting in the field has stopped short" of doing so. In so declining to fashion a rule respecting division of damages in the case before it, the Court took occasion to observe that the "collision case" rule urged upon it by the parties had never been "expressly applied * * * to non-collision cases" by this Court.

In rendering this observation, the Court intended to distinguish the peculiar facts of the case before it from those presented in any contribution cases which it had previously considered. In a footnote appended to that very sentence, the Court commented that it recognized the fact that lower federal courts had applied the divided damages rule in "non-collision cases," and went on to observe that its own opinion of five years earlier in *American Stevedores, Inc. v. Porello,* 330 U.S. 446 (1947) (reversing on other grounds the judgments below in a maritime "non-collision" personal injury case), had implicitly recognized that on remand "the district court would 'be free to adjudge the responsibilities of the parties' in accordance with the contribution rule announced by the lower federal courts." The Court stated that it did not, however, consider these comments to foreclose the issue presented in the case then before it. *Halcyon,* U.S. at 284, f.n. 5.

Against the historical backdrop, it clearly appears that this Court's decision in *Halcyon* to abstain from any "attempt to fashion new rules of contribution" was prompted by the peculiar situation there presented. In that case, one of the joint tortfeasors, the plaintiff's stevedore-employer, was statutorily shielded from tort liability to the injured plaintiff by the express provisions of the

Longshoremen's Act. 33 U.S.C. § 905. Since it is firmly established that contribution in admiralty arises directly from the tort rather than upon a theory of subrogation, *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U.S. 220, 226 (1907), *American Mut. Liability Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950), the commentators (C.f., Staring, *supra*, 305 f.n. 9; Allbritton, *supra*, 326) have argued, and the Courts of Appeals for the Fifth and Second Circuits (C.f., *Horton & Horton, Inc. v. T/S J.E. DYER*, 428 F.2d 1131 (5th Cir. 1970) cert. denied 400 U.S. 993 (1971); *Watz v. Zapata Off-Shore Company*, 431 F.2d 100 (5th Cir. 1970); *In Re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, 449 F.2d 132 (2d Cir. 1971), cert. denied 406 U.S. 949 (1972), reh. den. 408 U.S. 932 (1972)), have held, that the "prohibition" of *Halcyon* does not apply to a situation where none of the tortfeasors possesses a statutory immunity from tort liability and the injured party could have proceeded against any of the tortfeasors and could have recovered damages from each. Indeed, this interpretation of *Halcyon* has been espoused by the author of the opinion, Mr. Justice Black. Twelve years after he wrote for the Court in that case, he characterized the decision as follows:

> "In *Halcyon* * * * we held that the system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 325 (1964) (Black, J., dissenting).

In *Halcyon*, since the stevedore, the party against which contribution was sought, could not under the Longshoreman's Act be liable to the injured plaintiff as a tortfeasor, it was not liable for contribution. However, given a case of common liability of the tortfeasors to the injured party, *Halcyon* is inapplicable. In the present case, Cooper, not being Session's employer and hence not shielded by the Act as to him, was potentially liable and vulnerable to suit no less than was the Vessel. Thus the considerations which prompted the Court's abstention in *Halcyon* from any attempt "to fashion new judicial rules" in light of the fact that "Congress has made fault unimportant in determining the employer's responsibility to his employee," 342 U.S. at 285, are not present in the case at bar and do not confound application of traditional rules of contribution.

B. Division of damages in admiralty after *Halcyon*.

The dicta of *Halcyon* has not stemmed the tide of judicial decisions expounding the historical right of contribution among joint tortfeasors in admiralty, nor has there been anything like general acceptance of the expanded reading of that case urged by Cooper. It is true that some lower courts subsequently construed the *Halcyon* dicta, in light of the result reached in that case, to mean that there is no contribution in maritime personal injury cases, or that contribution is restricted to "collision cases" exclusively. On the other hand, nearly all the commentators have strongly attacked this interpretation of the case, attributing it to superficial construction or to "analytical shortcomings" of the opinion itself. See: Staring, *Contribution and Division of Dam-*

ages in Admiralty and Maritime Cases, 45 Cal. L. Rev. 304 (1957); Allbritton, *Division of Damages in Admiralty—A Rising Tide of Confusion,* 2 Journal of Maritime Law and Commerce 323 (1971).

In post-*Halcyon* decisions, the lower courts have continued to apply a rule of contribution in various non-collision cases, including cargo damage cases, such as *Cain Bros. Inc. v. Wieman and Ward Co.,* 223 F.2d 256 (3rd Cir. 1955); *Coca Cola Co., Tenco Div. v. SS NORBOLT,* 333 F. Supp. 946 (S.D. N.Y. 1971); *American Independent Oil Co. v. MS ALKAID,* 289 F. Supp. 329 (S.D.N.Y. 1967); and *Cities Service Ref. Corp. v. National Bulk Carriers, Inc.,* 146 F. Supp. 418 (S.D. Tex. 1956); and in cases involving damage to a vessel (other than by collision) such as *Pennsylvania R.R. Co. v. The Beatrice,* 275 F.2d 209 (2d Cir. 1960) (damages divided among three negligent parties—shipowner, employer of pilot, and assisting tug—where barge sank while ship was being docked nearby); *W. E. Hedges Transp. Corp. v. United Fruit Co.,* 198 F.2d 806 (2d Cir. 1952) (damages divided equally between barge and ship where barge capsized when ballast sand was being transferred from ship to barge); *Southport Transit Co. v. Avondale Marine Ways, Inc.,* 234 F.2d 947 (5th Cir. 1956) (equal division of damages between tug owner and repair yard for fire damage to tug due to negligence of each occurring at different times); *Moran Towing Corp. v. M. S. Gammins Const. Co.,* 409 F.2d 917 (1st Cir. 1969) (equally divided damages where scows were injured through combination of negligent loading of stone by contractor and ordinary wear and tear of barges); *Dow Chemical Co. v. Tug Thomas Allen,* 349 F. Supp. 1354 (E.D. La. 1972) (damages equally divided between joint-

ly negligent tug owner and barge owner where tug towing barge grounded on pipeline with resulting explosion, property damage and personal injury); and *Bilkay Holding Corp. v. Consolidated Iron and Metals Co.*, 330 F. Supp. 1313 (S.D.N.Y. 1971) (damages to barge divided equally between towing company, for negligent towage, and charterer, for negligence in furnishing a foul berth, after deduction by one-third for barge owner's own contributing negligence).

In personal injury litigation, the right of contribution has been clearly recognized in such cases as *Horton & Horton, Inc. v. T/S J. E. DYER*, 428 F. 2d 1131 (5th Cir. 1970), cert. denied 400 U.S. 993 (1971); *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970); and *In Re Seaboard Shipping*, 449 F.2d 132 (2d Cir. 1971), cert. denied 406 U.S. 949 (1972), reh. den. 408 U.S. 932 (1972), all of which correctly construed *Halcyon* as posing no bar to contribution where there was no statutory immunity from tort liability of the party against whom contribution was sought.

Horton was a suit arising out of the death of a tug deckhand, who drowned while attempting to retrieve the tug's running lights and electric cord from a sinking barge which was in her tow. The tug owner, after effecting a settlement with the decedent's heirs, took an assignment of their rights against all other parties and sued the barge owner. The District Court found that the barge was unseaworthy and its owner negligent. It also found the tug owner negligent and that the deckhand's death was proximately caused by the mutual fault of both. The tug owner's damages were equally divided between it and the barge owner. On appeal, the barge owner argued that contribution was improper, relying upon *Halcyon*. How-

ever, the Court of Appeals concluded that the rule of *Halcyon* was properly confined to the facts there presented—where one wrongdoer was statutorily immune from tort liability. Since in the *Horton* case, the heirs of the deceased deckhand could have proceeded against either the tug owner or the barge owner, the Fifth Circuit held that *Halcyon* did not stand in the way of a division of damages between the two joint tortfeasors.

Watz involved an action by a shipyard worker who was injured while installing pipe in an exhaust system aboard a drydock barge. A hand hoist holding a heaving pipe failed, because a link of load chain gave way, and caused the pipe to roll onto his leg and foot. He sued the vessel owner, which impleaded the hoist manufacturer, which in turn impleaded the chain manufacturer. The vessel owner ultimately prevailed on the theory that the barge was withdrawn from navigation and hence owed no warranty of seaworthiness; but the District Court found both the hoist manufacturer and the chain manufacturer negligent in the manufacturing and placing in trade and commerce of a dangerous and defective product, and it divided the damages equally between them. Pointing out that the plaintiff could have sued both tortfeasors, the Court of Appeals held that "[w]ith *Hacyon* inapplicable * * * contribution is proper here." 431 F.2d at 120.

In Re Seaboard Shipping Corp. was a case in which two crew members of a barge were killed when lost from a barge under tow during a storm on Lake Michigan. The District Court found that the barge owner was negligent in knowingly permitting the barge to remain in an unseaworthy condition; and that the tug owner was likewise negligent in setting out with its tow after gale warnings

had been issued, without radio communication with the barge and lacking a properly calibrated barometer. The Second Circuit held that a right of contribution existed between the barge owner and tug owner, and expressly agreed with the Fifth Circuit's view, stated in *Horton* and *Watz*, that *Halcyon* is inapplicable in cases where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute. Further, the Second Circuit went on to point out that *Halcyon* did not mention this Court's prior decision in *White Oak Transp. Co. v. Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341 (1922), approving a division of damages in a non-collision case arising from the loss of a vessel which sank in a canal due to the negligence of both the ship-owner and the canal company. Observing that this non-collision case had never been overruled, the Second Circuit concluded that *White Oak* "controls here on the question of contribution and the extent of it." 449 F.2d at 139.

Each of the appellate court opinions in *Horton* and *In Re Seaboard Shipping* considered and rejected any interpretation of the dictum of *Halcyon* that would result in an across-the-board denial of contribution in all non-collision admiralty cases. This Court denied certiorari in both cases.

C. The *Atlantic* case.

Cooper seeks to compel a much broader construction of *Halcyon* through its heavy reliance upon a cryptic *per curiam* pronouncement by this Court in affirming the Second Circuit's decision in *Benazet v. Atlantic Coast Line R. Co.*, 442 F.2d 694 (2d Cir. 1971), *aff'd per curiam sub. nom., Atlantic Coast Line R. Co. v. Erie Lackawana*

R. Co., 406 U.S. 340 (1972). The *Atlantic* case arose out of a suit by a yard brakeman, employed by Erie, for injuries sustained by him while working on a box car owned by another railroad, Atlantic, while the box car was being transported on a carfloat barge owned by Erie. The accident was allegedly due to a defective footboard and handbrake of the box car, and the plaintiff sued Atlantic for its negligence in supplying the defective equipment. Atlantic sought contribution from Erie, the plaintiff's employer, on the ground that it was also actively negligent in causing the injury. Both the District Court and the Second Circuit denied Atlantic's claim on the ground that contribution under the facts of the case was precluded by *Halcyon*. This Court affirmed with a one-sentence comment that the third party complaint for contribution "in this noncollision admiralty case" was properly dismissed on the authority of *Halcyon*.

Cooper argues that this pronouncement is authority for extending the rule of *Halcyon* beyond the facts of that case to encompass the situation where the joint tortfeasor against whom contribution is sought does not enjoy statutory immunity from tort liability. Firstly, Cooper points to the Court's description of the *Atlantic* case as a "non-collision admiralty case" and contends that this "can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases." Secondly, Cooper asserts that *Atlantic* must be read as overruling the prior decisions of the lower courts because "the party against whom contribution was sought [in that case] was not statutorily immune from direct action by the plaintiff."

The first contention may be disposed of simply. It is not only an obvious nonsequitur but also, as has been demonstrated elsewhere herein, is refuted by the authorities in this country extending back ten decades. Furthermore, if importance is to be attached to the Court's choice of particular words, one might just as logically read the phrase *"this* non-collision admiralty case" with an emphasis that would indicate an intention to limit the holding to the facts of that specific case. (In fact, we think that this is the correct reading of *Atlantic* since, as will be shown, the case is factually indistinguishable from *Halcyon.*)

The second contention is likewise erroneous: there was no common tort liability of the two wrongdoers to the plaintiff in *Atlantic*. As the District Court pointed out in its opinion in that case, the limited liability provisions of the Longshoremen's Act were applicable to and shielded the plaintiff's employer from direct suit. 315 F. Supp. 357, 364, fn. 4 (S.D.N.Y. 1970). In *Pennsylvania R. Co. v. O'Rourke,* 344 U.S. 334 (1952), this Court specifically held that a railroad brakeman who was injured while working on a freight car situated on a carfloat moored on navigable waters was subject exclusively to the Longshoreman's Act.

However, Cooper persists by arguing that the plaintiff in *Atlantic* could have sued his employer, Erie, for the unseaworthiness of its "vessel" (the carfloat) under the rule of *Reed v. The Yaka,* 373 U.S. 410 (1963), where this Court held that a longshoreman was not deprived by the Longshoreman's Act of his remedy based upon unseaworthiness of a vessel that happened to be owned by his employer. In this line of argument, Cooper is demon-

strably in error. In the first place, it is not at all clear that the plaintiff had any such remedy against his employer; and further, even if he did, the case would still not fall outside the *Halcyon* class of cases where there is no common liability of the joint wrongdoers as tortfeasors vis-a-vis the injured plaintiff.

Even if it be assumed *arguendo* that the *Atlantic* plaintiff could have sued his employer for the unseaworthiness of the carfloat, this Court's decision in *Reed* in no sense undermines the employer's statutory immunity from liability for its negligence, but rather turns upon the peculiar obligation of a shipowner to furnish a seaworthy vessel to those who do the work of seamen in her service. As the Court said in *Reed*, the shipowner-defendant in that case:

> "* * * was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. * * *" 373 U.S. at 415.

Contrary to Cooper's suggestion that the two cases are irreconcilable, the holding in *Reed* resolved an issue which was not presented to or considered by the Court in *O'Rourke*, where it was held only that a maritime worker may not proceed against his employer on grounds of *negligence* in view of the prohibition of the Longshoremen's Act.

Liability for unseaworthiness is a species of liability without fault which derives from the employer's peculiar obligations as a shipowner. "It is peculiarly and exclusively the obligation of the owner * * *." *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 100 (1946). It does

not in any sense constitute a basis of common liability for concurrent fault with a third party. Since, as has been previously noted, contribution in admiralty arises directly from the tort rather than circuitously upon a theory of subrogation, *Erie R. Co. v. Erie & W. Transport Co.*, 204 U.S. 220, 226; *American Mut. Liability Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950), the vessel owner's potential liability—apart from any consideration of fault—on grounds of unseaworthiness does not afford a basis for the common liability for concurrent fault which is the *sine qua non* of contribution. Since under the Longshoreman's Act the employer-vessel owner cannot be a tortfeasor, he is not liable for contribution.[1]

It is questionable in any event whether the *Atlantic* plaintiff did in fact have a cause of action against his employer on any theory or, at least (as the Court of Appeals noted in its opinion in the present case, 479 F.2d at 1042) the situation is simply unclear. As is evident from the opinions of the lower courts in the *Atlantic* case, the case was tried practically to conclusion without any recognition by the parties of the applicability of mari-

1. When an employer possesses statutorily limited liability to his employee, any adjustment of liabilities between the employer and a negligent third party must be a function of some relationship existing between them and cannot be derivative of the plaintiff's cause. Thus, in the familiar longshoreman-vessel owner-stevedore triangular litigation, where the shipowner is rendered vicariously liable by virtue of an unseaworthy condition created by the stevedore, the shipowner's remedy sounds in contract for breach by the stevedore of its implied warranty of workmanlike performance, as enunciated by *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The District Court in *Atlantic Coast Line* appeared to recognize this. 315 F. Supp. 364, fn. 4. However, in a case such as the instant one, where either party was potentially liable to the plaintiff for negligence, a finding of concurrent negligence gives rise to a right of contribution grounded in their common liability to the plaintiff.

time principles. Many questions relevant to the rights and status of the parties were not raised or resolved by the trier of fact or the court. Was this plaintiff, a yard brakeman working on a rail boxcar, a "seaman" in the contemplation of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), so as to be entitled to the warranty of seaworthiness in the first instance? As a related inquiry, was the carfloat a vessel in navigation? C.f., *West v. United States*, 368 U.S. 118 (1959). This Court has held that a shore-based worker cannot recover for injuries caused by unseaworthiness if his employment is not of a type traditionally done by seaman or was not so engaged aboard a vessel in navigation. *United Pilots Assn. v. Halecki*, 358 U.S. 613 (1959); *Roper v. United States*, 368 U.S. 20 (1960). See also: *McQuaid v. United States*, 337 F.2d 483 (3d Cir. 1964); *McCowan v. Humble Oil & Refining Company*, 405 F.2d 596 (4th Cir. 1969), cert. denied 395 U.S. 934 (1969); *Delome v. Union Barge Line Co., et al*, 444 F.2d 225 (5th Cir. 1971), cert. denied, 404 U.S. 995 (1971). Further, no consideration was apparently given to the question of implicit warranties or contractual relations between the railroads, c.f, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which might entitle Erie to indemnity should it be held liable by reason of an unseaworthy condition created by the negligence of Atlantic.

In urging this Court's cryptic pronouncement in *Atlantic* as compelling an extension of the *Halcyon* holding far beyond the facts of that case to establish a rule that no right of contribution obtains in any "non-collision" admiralty case, despite all historical procedents to the contrary, Cooper clearly seeks to impart a very profound im-

pact on admiralty jurisprudence to a very few words. The policy arguments with which this position is bolstered are addressed elsewhere within this brief. It is worth noting, however, as has been observed in another context, that one significant consideration is "the unlikelihood of the Supreme Court undertaking to make such a sweeping choice in the heavy seas of conflict by such an unilluminating pronouncement." *Grigsby v. Coastal Marine Service*, 412 F.2d 100; (5th Cir. 1969) (per Brown, Chief Judge) cert. dism'd 396 U.S. 1033 (1970). Such a summary disposition of *Atlantic* was certainly not surprising in view of the peculiar fact situation of that case, which might initially have appeared to present a suitable vehicle for the Court's examination of the issue of contribution outside the *Halcyon* fact situation, but on closer examination turns out to be a case indistinguishable from *Halcyon*.

It seems quite significant to note here that only one week after this Court delivered its per curiam opinion in *Atlantic*, it denied certiorari in *In Re Seaboard Shipping Corp., supra, (sub. nom. Seaboard Shipping Corp. v. Moran Inland Waterways Corp.*, 406 U.S. 949), wherein the Second Circuit allowed contribution in a non-collision context, expressly distinguishing *Halcyon* as limited to cases where the party from which contribution is sought is statutorily immune from tort liability. Even later, the Court denied a rehearing in the case. 408 U.S. 932. It is worthy of note that the Court did not choose, as it did in *Atlantic*, to dispose of the case summarily by reversing it "on the basis of *Halcyon* * * *."

As has been demonstrated, nothing in this Court's prior decisions forecloses it now to fashion rules respecting division of damages in admiralty which will "best

serve the ends of justice," as the Court defined its power so to do in *Halcyon, supra,* 342 U.S. at 285. For that purpose, it is respectfully submitted that this case, unlike *Atlantic,* affords a suitable vehicle.

III.

THERE IS NO COMPELLING REASON IN POLICY OR PRECEDENT FOR THIS COURT TO ABSTAIN FROM FASHIONING RULES CONCERNING DIVISION OF DAMAGES AMONG JOINT TORTFEASORS IN ADMIRALTY.

Cooper urges this Court to follow its course in *Halcyon* and abstain once again from enunciating any rule of contribution in the present case, leaving these parties without remedy and relegating to Congress the problem of working out any "compromise between competing economic forces" in the field of maritime commerce. (Brief for Petitioner, pp. 13.) It hardly seems appropriate, however, that this Court should choose now to decline to fashion appropriate rules of contribution among joint maritime tortfeasors, in view of the pervasiveness of the divided damages doctrine in admiralty jurisprudence, as well as the undeniable fact that the adjustment of rights *inter se* among such parties has been one primarily of judicial, not legislative concern.

A. *Ryan* and its progeny.

In retrospect over the last two decades, it seems singularly inappropriate to suggest that this Court now leave the development of the law governing the relationship between vessel owner and stevedoring contractor, and other analogous maritime relationships, to legislative adjustment. While the *Halcyon* opinion contains some language con-

cerning the desirability of leaving to Congress the task of "bring[ing] about a fair accommodation of the diverse but related interests of these groups," *Halcyon*, supra at 15, yet it is hardly possible to demonstrate that this view has prevailed as the attitude of the Court. On the contrary, it is undeniable that this "area of the law" has been one primarily of judicial concern and one in which this Court has long assumed the role of chief policy maker.

As is well known, *Halcyon* was not this Court's retiring word in the adjustment of liabilities between shipowner and stevedore. Four years later, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956), found in the contractual relationship between ship and stevedore an "implied warranty of workmanlike service," the breach of which by the stevedore rendered it liable to indemnify the shipowner for any resulting liability which the latter incurred, including for the personal injuries of a longshoreman employed by the stevedore. This liability of the stevedore inhered in his express or implied contract with the shipowner, and the stevedore could no longer hide behind the tort immunity afforded him by the Longshoreman's Act. Later, in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1957), the Court taught that the shipowner could in some instances be precluded by his conduct or the condition of his vessel from the recovery of indemnity, notwithstanding the stevedore's breach of warranty. In *Italia Societa Per Azioni v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964), the Court articulated the underlying rationale of *Ryan-Weyerhaeuser*, that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." 376 U.S. at 754.

As recently as 1969, this Court announced yet a new cause of action, holding in *Federal Marine Terminals v. Burnside Shipping Co., Ltd.*, 394 U.S. 488 (1969), that a stevedore could maintain a direct action in tort against the shipowner for compensation payments incurred by reason of the shipowner's negligence. In several provocative paragraphs of dicta, the Court indicated that its prior decisions would not foreclose the possibility of recovery upon other tort or contract theories, and that it was deciding nothing with respect to the interaction between the shipowner's breach of warranty claim and the stevedoring contractor's tort claim against the shipowner.

Meanwhile, the lower federal courts have extended the *Ryan* principles beyond the shipowner-stevedore context to many other relationships, C.f., *Dunbar v. Henry DuBois' Sons Co.*, 275 F.2d 304 (2d Cir. 1960, cert. denied 364 U.S. 815 (1960); *Whisenant v. Brewster-Bartle Offshore Company*, 446 F.2d 394 (5th Cir. 1971); and have acted upon this Court's invitation in *Burnside* to entertain new theories of indemnity between shipowner and stevedore, *Quadrino v. SS THERON*, 323 F. Supp. 1037 (S.D.N.Y. 1970), aff'd 463 F.2d 959 (2d Cir. 1971); *Atlantic & Gulf Stevedores v. Skibs A/S Danmotor*, 342 F. Supp. 837 (S.D. Tex. 1971).

It is unnecessary to lengthen this discussion with further exposition of the growth of *Ryan* and its progeny in order to demonstrate that this Court's many post-*Halcyon* decisions, and the numerous interpretations of them by the lower courts, have made the "accommodation of the diverse but related interests" (*Halcyon, supra*, 342 U.S. at 286) in the area of maritime commerce a subject of massive judicial involvement, notwithstanding any language in *Halcyon* evidencing timidity concerning the pros-

pect. The intensive judicial activity of two decades refutes any suggestion that the defining of rights *inter se* among these groups is primarily a legislative concern. Now to refer these parties and their controversy to Congress would be anamolous and inappropriate.

B. Recent amendments to the Longshoremen's Act.

Cooper suggests that Congress' enactment of the 1972 amendments to Sec. 5 of the Longshoreman's Act, 33 U.S.C. §905, gives this Court reason to hark back to *Halcyon's* abstention approach and retreat from the area in view of the recent legislative initiative. But, as is apparent from the legislative history, Congress' purpose in enacting the 1972 amendments was not to accept *Halcyon's* twenty-year-old invitation to preempt the field of risk distribution in the maritime industry, but rather to satisfy a felt need for a substantial increase in the rate of compensation benefits payable under the Act. The concurrent amendment of Sec. 5 to eliminate the longshoreman's unseaworthiness remedy and the vessel's derivative indemnity action against the stevedore-employer (33 U. S.C. §905(a)) was included as an offset to the employer's greatly expanded compensation exposure, by removing his circuitous *Sieracki-Ryan* liability for general damages for his employees' injuries.[2]

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2. The Report of the House Education and Labor Committee (No. 92-1441), is excerpted below:

"Purpose and Background of Legislation"

"Amendments to the Longshoremen's and Harbor Workers' Compensation Act are long overdue. This Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at $70 a week. Today, the average longshoreman's or ship repairman's

While this legislation obviously affects the rights *inter se* of vessel owners and stevedores in some circumstances, it certainly is not addressed to the overall problem of allocation of damages in the field of maritime commerce and hardly affords any reason for complete abolition of the judicial rule of contribution in all non-collision admiralty

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wage is over $200 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is needed. Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen. * * *

"The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. * * *

"The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker. * * *"

1972 U.S. Code Cong. & Adm. News 4698-4699, 4703, 4704.

The Senate Labor and Public Welfare Committee Report (No. 92-1125) is in all substantial respects identical.

cases. For all practical purposes, it is simply irrelevant to the Court's consideration of the present case.[3]

C. Uniformity in the law of admiralty.

As Cooper has correctly pointed out, "[a]n underlying theme of admiralty, and one of the reasons for the existence of a separate body of admiralty law is the desire for uniform principles to govern maritime activities throughout the United States." (Brief for Petitioner, p. 15) This Court has recently cited the desirability of assuring "uniform vindication of federal policies" as a ground for overruling an 84-year-old precedent that anomously declined to recognize a right of recovery for wrongful death under the general maritime law. *Moragne v. States Marine Line, Inc., et al,* 398 U.S. 375 (1970), overruling *The Harrisburg,* 119 U.S. 199 (1886). By the same token, it is difficult to imagine a rule which is more pervasive in admiralty jurisprudence than the doctrine of divided damages, and clearly its abolition outside the narrow context of ship collision cases would work a substantial disruption in the uniform application of maritime principles.

In the first place, such a dichotemy in application of contribution principles, which would require their strict application in one class of cases and their absolute prohibition in another, would simply establish an illogical inconsistency in the law, and one for which there is no rational justification. In fact, it would turn admiralty's face against a principle so rooted in historical concepts

3. As Cooper correctly points out, the 1972 amendments to the Longshoremen's Act would apparently have no effect upon a case arising on facts similar to the present one, since Cooper was not Sessions' employer and would not be entitled to the exclusive liability benefits of §5(a).

of equity and which this Court has long ago described as "manifestly just and proper." *The Max Morris,* 137 U.S. 1, 14 (1890).

Furthermore, a rule prohibiting contribution in a maritime tort case of joint wrongdoers would produce an inconsistent result in a specific case, where there is permitted comparison of the negligence between the injured tort victim and the tortfeasor against whom he recovers. Under such a rule, the liable tortfeasor would be entitled to the benefit of credit for that portion of the damages attributed to the victim's own negligence, but would be denied a like credit for that portion of the same damages caused or contributed to by another wrongdoer. The injustice of that situation is manifest in a case, such as the present one, where the tort victim chooses to sue only one of the joint wrongdoers, who then must fully satisfy the loss without recourse (absent a right of contribution) for that portion of the damages which are not of his own doing.

Cooper contends that "the rule denying contribution does provide a clear guide for the planning of activities in the maritime sphere." (Brief for Petitioner, p. 18.) This, of course would be true if the rule were in fact uniformly applied. But the rule contended for by Cooper would divide admiralty jurisprudence into arbitrary classes of cases for determining the availability of contribution, and would bring about the illogical and inconsistent result of permitting division of damages between a tortfeasor and his victim when there is negligence in the party suing, but forbidding an equitable apportionment of the loss which is caused by the concurring wrongs of multiple parties. Moreover, as this Court has recognized, it does not serve the law's purpose to "furnish a clear guide

for the conduct of individuals", *Moragne v. States Marine Line,* 398 U.S. 375, 403 (1970), for this Court to reverse a long-established judicial principle rooted in ten decades of prior decisions. For the adoption of such a rule prohibiting any right of contribution outside the context of collision cases would necessarily require overruling a long line of this Court's prior decisions, discussed in Part I of this brief, beginning with *The Alabama and the Gamecock,* 92 U.S. 695 (1875), and certainly including *Atlee v. Packet Co.,* 88 U.S. (21 Wall) 389 (1874), and *White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co.,* 258 U.S. 341 (1922). It would require disapproval of a multitude of lower court decisions many of which this Court has previously declined to review and a number of which it has specifically approved, c.f., *The Max Morris,* 137 U.S. 1 (1890); *The Nidarholm,* 34 F.2d 442 (1st Cir. 1929), aff'd 282 U.S. 681 (1931).[4]

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4. Cooper raises the curious point that its incurrence of liability for *contribution* in this case did not fall within the potential liabilities which it contemplated in "planning its activities," including its contractual dealings with the Vessel. This is strange, in the first instance, because Cooper acknowledges awareness of "existing rules which, under some circumstances, might impose liability upon Cooper to indemnify the vessel with respect to accidents occurring in subsequent ports." (Brief of Petitioner, p. 20.) In other words, Cooper would not have been surprised to incur liability for full *indemnity* to the Vessel in this case, but complains that it unexpectedly was held only for contribution. In any event, the contention that "[t]he reasonable expectation of all of the experienced maritime lawyers involved in this litigation was that there was no such right of contribution" is obviously not well-taken, in view of the explicit holdings to the contrary by the Court of Appeals for the Fifth Circuit in *Horton* and *Watz.*

In this connection, Cooper suggests that its lack of foresight as to the outcome of this case left it exposed on an uninsured risk. Of course, even if such a consideration would be deemed relevant to a resolution of the present issue, there is absolutely no evidence in the

Quite contrary to Cooper's assertion, the principle of uniformity in the law, and its purpose to furnish a clear guide for the conduct of individuals, is clearly best served by a recognition of the universal application of the historic principle of contribution in all cases of maritime tort founded upon negligence, save only in that narrow class of cases where one concurrent wrongdoer is statutorily shielded from tort liability.

IV.

CONTRIBUTION IS PROPER IN THE PRESENT CASE.

In the case at bar, the District Court found that the injuries and damages sustained by the plaintiff, Sessions, were caused by the concurring negligence of the Vessel and of Cooper. Since each tortfeasor was potentially liable to the plaintff for its negligence, a finding of concurrent negligence gives rise to a right of contribution grounded in their common liability to the plaintiff. However, Cooper raises certain additional objections to the propriety of the award of contribution in the present case, which will be dealt with in this section of the brief.

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record as to what, if any, liability or indemnity insuring agreements Cooper may have had. However, it is obviously unlikely that any comprehensive general liability coverage would be so narrowly and peculiarly drawn as to insure the risk of indemnity but exclude coverage for contribution. If Cooper is in fact uninsured on its liability in this case, such is more probably due to a lack of foresight in other particulars, such as failure to obtain (at increased premiums, no doubt) a "completed operations" endorsement which would expand coverage to liability incurred by reason of its breach of warranty and arising after the vessel had sailed from the loading port.

A. The Vessel did not extinguish its cause of action against Cooper by settling its separate and distinct cause against Mid-Gulf.

Cooper argues that the Vessel cannot recover contribution against Cooper because of a prior settlement of its indemnity claim against Mid-Gulf, the plaintiff's employer. The argument is that the Vessel "has already been fully indemnified" and has not suffered any damages for which it is entitled to contribution. (Brief for Petitioner, p. 23.)

Even assuming that there is any merit to this argument theoretically, it is unsupported by evidence. The terms of the settlement between the Vessel and Mid-Gulf were never spread upon the record, and there is most certainly no evidence that "Mid-Gulf made an agreement with the vessel agreeing to indemnify it against any recovery which might be made by the plaintiff." (Brief for Petitioner, p. 23.)[5]

Cooper's basic reasoning, however, is fallacious. The Vessel's respective claims against Mid-Gulf and Cooper were neither joint nor interdependent. Each claim was grounded upon a breach of a separate contractual obligation—the stevedore's implied warranty of workmanlike service. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956). Under the rule of *Ryan*, "* * * every stevedoring contract contains an implied warranty

5. Trial counsel for the Vessel, Mr. Dixie Smith, was called as a witness by Cooper at the trial, apparently in an attempt to prove up the terms of the settlement between the Vessel and Mid-Gulf. However, Mr. Smith testified that the settlement negotiations in question were consummated without his knowledge and that he was not in fact aware of the exact terms of the settlement. (A. 119) No other evidence on this matter was offered.

running from the stevedore-employer to the shipowner that the stevedoring operations will be performed in a safe and workmanlike manner." *American Export Isbrandtsen Lines, Inc. v. City of Milwaukee,* 440 F.2d 502, 504-505 (7th Cir. 1971).

The claim against Mid-Gulf was based upon incidents occurring while employees of that contractor were working aboard the KARINA at Houston on July 2, 1969; the claim against Cooper was grounded upon events occurring on June 28, 1969, at Mobile, and arising out of work then being done aboard the same ship by employees of Cooper. Because these liabilities were several and not joint, the Vessel had the right to proceed against either or both, to settle one and prosecute suit on the other, or to abandon one while preserving its rights against the other. The Vessel has never evidenced any intention of abandoning its claim against Cooper.

As against Mid-Gulf, the Vessel was entitled to recover such damages as could be shown to have been occasioned by reason of that stevedore's breach of warranty. Such damage is unrelated to that occasioned by reason of Cooper's negligence. Cooper is not entitled to credit against the damages attributable to its own negligence for any amount recovered by the Vessel under its separate contractual arrangements with another party.

B. The pleadings adequately apprised Cooper of the facts in issue and that the Vessel was seeking recovery over in respect of Session's damages.

Cooper's contention that contribution should be denied because the Vessel sought only full indemnity in its plead-

ings is frivolous. Cooper was clearly apprised that the Vessel was seeking recovery over in respect of the liability asserted against it by Sessions, and it is absurd to suggest that the ultimate allowance against it of a lesser recovery constituted surprise to Cooper. It is hornbook law that pleadings are to be liberally construed. *United Mine Workers of America v. Electro Chemical Engraving Co.*, 175 F. Supp. 54 (S.D. N.Y. 1939). It is sufficient that pleadings inform the parties and the Court of facts in issue so that the court may declare the law and the parties may know what to meet by their proof. *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946), cert. denied 329 U.S. 733 (1946).

C. Contribution was properly allowed because Cooper was found to be jointly negligent with the Vessel in causing Sessions' damages.

Cooper curiously asserts that it was "not found to be a tortfeasor vis-a-vis the plaintiff, and there is no finding that Cooper breached any duty to the plaintiff." (Brief for Petitioner, p. 25.) That contention is simply in error. The District Court plainly stated in its oral findings the following:

> "That Cooper Stevedoring Company was responsible for the stowage and that they were negligent in not stowing the cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them. * * *" (A. 164)

There can be no question that the trial court concluded that Cooper and the Vessel were joint tortfeasors

vis-a-vis Sessions. Elsewhere, the Court summarized his liability findings as follows:

> "And that is what I find, that they [Cooper and the Vessel] are each fifty percent responsible for the injury to Mr. Sessions." (A. 165)

Cooper also argues that it breached no duty it owed the Vessel, a contention which confuses the indemnity and contribution issues, since the right of contribution is "a consequence of the joint tort and attached to the joint liability," 2 Benedict, *Admiralty* 552 (6th ed. 1940), while the right of indemnity arises out of a separate relationship between indemnitor and indemnitee. (Cooper's contentions concerning the duties owing between shipowner and stevedore will be dealt with elsewhere.) Cooper's liability for contribution is founded upon concurrent negligence in causing the plaintiff's injuries and damages, as indisputably found by the trier of fact.

D. The cause should not be remanded.

Cooper suggests that if contribution is to be awarded in the present case, then the case should be remanded to the trial court "to consider afresh the case as a contribution case, giving the parties the right to develop both the facts and the law further." (Brief for Petitioner, p. 22.) Cooper does not suggest what "facts" could be developed which were not adduced at trial. Certainly the parties have had ample opportunity to develop all facts relevant to the incident made the basis of this suit, and the issues before this Court are purely issues of law which have now been fully developed through two appeals. No apparent purpose would be served by a remand. The case is properly one for decision by this Court.

V.

WHERE JOINT TORTFEASORS STAND IN A CONTRACTUAL RELATIONSHIP, DAMAGES SHOULD BE APPORTIONED AMONG THEM ON A COMPARATIVE FAULT BASIS, UNLESS THEIR RIGHTS ARE TO BE DETERMINED STRICTLY ON THE BASIS OF IMPLIED WARRANTY AND INDEMNITY.

The rights and obligations *inter se* of shipowners and stevedores have been ordinarily determined according to their contractual relationships and the implicit nature thereof as defined by *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan*, this Court held that where a shipowner and stevedoring company enter into a service agreement, the former is entitled to indemnification for any damages it sustains (including attorney's fees and expenses incurred in resisting a claim against it) as a result of the stevedoring company's breach of its implied warranty of workmanlike service. "This undertaking . . . is comparable to a manufacturer's warranty of the soundness of its manufactured product." 350 U.S. at 133-134. This Court has distinguished recovery of indemnity for breach of warranty from a right of contribution between joint tortfeasors, pointing out that each "proceed on two wholly distinct theories and produce disparate results." *Italia Societa v. Oregon Stevedoring Company*, 376 U.S. 315, 321 (1964).

Cooper urges that rules of divided damages be excluded from application between parties who stand in a contractual relationship and that risks of loss between them should be allocated in accordance with the law of con-

tractual indemnity under *Ryan*. It is true that *Ryan* is clearly applicable on its face to the present case, and the right of contribution among joint tortfeasors who stand in a contractual relationship must therefore be reconciled with existing doctrines of indemnity.

A. On the basis of a strict *Ryan* analysis, the Vessel is entitled to recover full indemnity from Cooper.

A strict application of *Ryan* to the exclusion of any rule dividing damages in the present case would not, as Cooper suggests, result in exoneration from liability for Cooper, but rather would require that the Vessel recover full indemnity. This result follows from the District Court's finding of a negligent breach by Cooper of its warranty of workmanlike service owing to the Vessel. (A. 164, 168)

Cooper's contention that indemnity should be denied on a strict *Ryan* analysis is based upon its incorrect assertion that the Vessel "was guilty of conduct sufficient to preclude indemnity." (Brief for Petitioner, p. 30) The District Court made no such finding. Rather, the trial court simply stated his feeling that "the ship itself has a responsibility" relative to the stowage of cargo, and that "the only thing to do is to divide the liability in this case equally" between the Vessel and Cooper. (A. 165) However, under *Ryan*, it would be improper to compare the fault of the Vessel and Cooper for purposes of adjusting the liabilities between them. The comparative fault of shipowner and stevedore measured in terms of negligence is irrelevant. If the stevedore renders a substandard performance leading to foreseeable liability on the part of the

shipowner, then the latter is entitled to indemnity "absent conduct on its part sufficient to preclude recovery." *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958). The shipowner's conduct in this connection is likewise measured by the law of contract; and such conduct, to preclude indemnity, must be sufficient to prevent the workmanlike performance of the stevedore's contractual obligations. *Waterman S.S. Co. v. David*, 353 F.2d 660 (5th Cir. 1965), cert. denied 384 U.S. 1008; *Southern Stevedoring & Contract Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (5th Cir. 1968).

Cooper seeks to compel a finding of "preclusion" on the theory that, notwithstanding its negligent stowage of the cargo in such a manner as to cause Sessions' injuries, still it was the Vessel's responsibility to inspect the stowage and insist that Cooper correct its improper condition. (Brief for Petitioner, pp. 26-28.) This argument simply flies in the face of *Ryan*, which explicitly rejected the stevedore's argument that a shipowner's right to indemnity could be defeated by the shipowner's failure to supervise the stowage and reject unsafe stowage by the stevedore:

> "* * * [T]he contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense." 350 U.S. at 135.

The District Court was quite correct, of course, in postulating that both the Vessel and Cooper had a "responsibility" with respect to the condition of the cargo. The Vessel owed a nondelegable duty to furnish all workmen who labor in its service, including a longshoreman such as Sessions, a seaworthy vessel. *Seas Shipping Co., Inc. v.*

Sieracki, 328 U.S. 85 (1946). However, the duties owing from the Vessel to Sessions were not identical with those owing by Cooper to the Vessel; for the warranty which Cooper owed when its employees boarded the KARINA was plainly for the benefit of the Vessel. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 at 429 (1959). Even though the District Court could find that, measured by tort standards, the Vessel was negligent in failing to inspect, discover or correct Cooper's improper loading methods and/or the resulting unsafe condition, while this would be relevant to provide Sessions a basis of recovery against the Vessel, it would have no bearing upon the Vessel's right of recovery against Cooper for its breach of warranty in failing properly to stow the cargo.

Here, the substandard conduct of the stevedore, Cooper (as measured by its warranty) was a proximate cause of the Vessel's damages, and there is no finding of conduct on the part of the Vessel sufficient to preclude indemnity. Therefore, if the present case is to be resolved upon a strict *Ryan* indemnity analysis, to the exclusion of contribution principles, the inexorable result is that the Vessel recover its full indemnity from Cooper.

B. Damages may be equitably apportioned between parties in a contractual relationship by precluding recovery of indemnity to the extent that the loss is caused by the negligence of the indemnitee.

Many authorities believe that the *Ryan* theory of indemnity was originally formulated by this Court in an effort to ameliorate the harsh results of *Halcyon*. E.g., Baer, *Admiralty Law of the Supreme Court*, p. 195 (2d ed. 1969); Gilmore & Black, *The Law of Admiralty*, p. 367

(1957); Bue, *Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I*, 4 Houston L. Rev. 347, 410 (1966). However, the "sudden death playoff" nature of the *Ryan* approach may just as frequently result in transferring the inequity by saddling the indemnitor with full liability in a multiple fault situation, even though his fault is comparatively less than that of his indemnitee. C.f., *McLaughlin v. Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2d Cir. 1969), cert. denied 395 U.S. 946 (1969). Therefore, it hardly seems imperative that *Ryan* be read as preempting any theory of division of damages outside the *Halcyon* situation, i.e., where the statutory tort immunity of one wrongdoer precludes a comparative negligence approach.

This Court has previously recognized the principle that damages may be apportioned between parties in a contractual relationship where the fault of both has contributed to cause the loss. *United States v. Seckinger*, 397 U.S. 203 (1970), was a case in which the United States had satisfied a tort judgment against it obtained by an employee of one of its contractors for personal injuries sustained while working on a Government project. It then brought suit against the contractor seeking indemnity under a clause of the construction contract providing that the contractor would be responsible for damages occurring as a result of the contractor's fault or negligence. The Court of Appeals had held that the Government's recovery on the contract was foreclosed since its negligence had contributed substantially to the employee's injury and since the contract did not specifically provide for indemnity against the Government's own negligence. 408 F.2d 146. On certiorari, however, this Court reversed, and held that liability should be premised on the basis of comparative negligence, the contractor being

required to indemnify the Government to the extent of the contractor's negligence contributing to the employee's injuries, but not insofar as the injuries were caused by the Government's negligence. The cause was remanded to the District Court for specific findings as to the relative fault of each.

This approach is sound authority for dividing damages on a comparative fault basis among parties in a contractual relationship rather than resorting to an "all or nothing" approach on the basis of a simple breach of warranty analysis. On this basis a shipowner would be precluded from recovering its damages occasioned by reason of substandard performance by a stevedore of its contractual obligations to the extent that the loss was actually contributed to by the shipowner's own fault. Thus, in the present case, the Court of Appeals concluded that the Vessel's own fault, which the District Court found to have contributed equally with Cooper's negligence to cause Sessions' damages, precluded its full recovery of indemnity from Cooper. The parties were therefore each required to bear that portion of the damages which could be ascribed to their own negligence.

Thus the result reached in the present case is an equitable one which comports with admiralty's traditional concept of division of damages in cases of mutual fault. It could obtain in all cases in which the rights and obligations of the parties are defined by contractual arrangement.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit, decreeing

that Respondents recover contribution from Petitioner in respect of the damages adjudged in favor of Troy Sessions by the District Court. Alternatively, if contribution is disallowed in the present case, then this Court should reverse the judgments below and render judgment that Respondents recover full indemnity in respect of all damages payable to Sessions, together with Respondents' reasonable attorneys' fees and expenses incurred in the defense of Sessions' claim against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this _____ day of March, 1974, a true and correct copy of the foregoing Brief for Respondents was personally delivered to counsel for Respondents, Joseph D. Cheavens, of Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002.

Bruce Dixie Smith